

1 NANCY L. STAGG CA Bar No. 157034  
nstaggs@foley.com  
2 BENJAMIN J. MORRIS, CA Bar No. 260148  
bmorris@foley.com  
3 **FOLEY & LARDNER LLP**  
ATTORNEYS AT LAW  
4 402 W. BROADWAY, SUITE 2100  
SAN DIEGO, CA 92101-3542  
TELEPHONE: 619.685.6454  
FACSIMILE: 619.234.3510

5 THOMAS S. BROWN, CA Bar No. 178620  
tsbrown@foley.com  
6 **FOLEY & LARDNER LLP**  
ATTORNEYS AT LAW  
7 555 CALIFORNIA STREET, SUITE 1700  
SAN FRANCISCO, CA 94104-1520  
TELEPHONE: 415.434.4484  
FACSIMILE: 415.434.4507

Attorneys for Defendant FEDERAL NATIONAL MORTGAGE ASSOCIATION

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

13 STANLEY D. CANNON and PATRICIA R.  
14 CANNON, individually, and for all other  
persons similarly situated.

15 Plaintiff,

16 | v.

17 WELLS FARGO BANK, N.A., FEDERAL  
18 NATIONAL MORTGAGE ASSOCIATION,  
and ASSURANT, INC..

19 Defendants.

Case No: CV-12-01376 EMC

**DEFENDANT FEDERAL NATIONAL  
MORTGAGE ASSOCIATION'S NOTICE  
OF MOTION AND MOTION TO DISMISS  
FIRST AMENDED CLASS ACTION  
COMPLAINT AND MOTION TO  
STRIKE; MEMORANDUM OF POINTS  
AND AUTHORITIES IN SUPPORT  
THEREOF**

DATE: NOVEMBER 30, 2012  
TIME: 1:30 P.M.  
CTRIM: 5  
Judge: Hon. Edward M. Chen

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## **NOTICE OF MOTION AND MOTION**

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that at 1:30 p.m. on November 30, 2012, in Courtroom 5 of the  
4 United States District Court for the Northern District of California, located at 450 Golden Gate  
5 Avenue, San Francisco, California, 94102, or as soon thereafter as the matter can be heard by the  
6 Honorable Edward M. Chen, defendant Federal National Mortgage Association (“Fannie Mae”)  
7 will, and hereby does, move to dismiss Counts I, IV, V, VI, VII, and VIII of the First Amended  
8 Class Action Complaint in this action for failure to state a claim upon which relief can be granted  
9 under Federal Rule of Civil Procedure 12(b)(6) against Fannie Mae and to dismiss or strike  
10 Plaintiffs’ request for a jury trial under Federal Rule of Civil Procedure 12(b)(6) and 12(f).

11 This motion is based on this Notice of Motion and Motion, the accompanying  
12 Memorandum of Points and Authorities and Request for Judicial Notice, the pleadings,  
13 documents, records and other material on file in this matter, the arguments of counsel at the time  
14 this motion is heard, and such other further material as the Court may allow.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SUMMARY OF REASONS WHY THE MOTION TO DISMISS AND MOTION TO STRIKE SHOULD BE GRANTED**

18 Plaintiffs Stanley D. Cannon and Patricia R. Cannon (“Plaintiffs”) bring this putative  
19 class action alleging Defendant Wells Fargo Bank N.A. (“Wells Fargo”) improperly force-placed  
20 flood insurance (i.e. lender-placed insurance or “LPI”) on Plaintiffs’ property with higher policy  
21 limits than their security instruments or federal law required—and that Wells Fargo derived an  
22 improper financial benefit – a kickback – from Defendant insurer Assurant, Inc (“Assurant”)  
23 when charging Plaintiffs the cost of the LPI. First Amended Class Action Complaint (“Amended  
24 Complaint” or “Amd. Compl.”), at ¶ 8. In addition to naming Wells Fargo as a defendant, in  
25 their Amended Complaint Plaintiffs added Assurant and Fannie Mae as defendants.

26 Plaintiffs' Amended Complaint asserts six causes of action against Fannie Mae: breach of  
27 contract (Count I); breach of fiduciary duty (Count IV); violation of the federal Truth In Lending  
28 Act ("TILA"), 15 U.S.C. § 1601, et seq. (Count V); violation of California's Unfair Competition

1 Law (“UCL”), Cal. Business & Professions Code §17200, et seq. (Count VI); violation of the  
 2 federal Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §2601, et seq. (Count VII)  
 3 and “equitable relief” (Count VIII). Each of Plaintiffs’ claims against Fannie Mae should be  
 4 dismissed with prejudice and a judgment of dismissal awarded to Fannie Mae.

5 First, Plaintiffs’ claims fail as to Fannie Mae because Plaintiffs fail to plead any facts  
 6 alleging Fannie Mae itself engaged in any wrongful or illegal conduct, or had any direct  
 7 involvement with or knowledge of the alleged acts of Plaintiffs’ mortgage servicer, Wells Fargo,  
 8 or insurer Assurant. Rather, Plaintiffs concede Fannie Mae’s liability is vicarious, based “by and  
 9 through” the alleged acts of Fannie Mae’s “agent” Wells Fargo. See Amd. Compl., at ¶¶ 26,  
 10 122, 128, 131-133. However, as a matter of law, Wells Fargo is not Fannie Mae’s agent and  
 11 therefore Fannie Mae cannot be held vicariously liable for Wells Fargo’s alleged acts.

12 Second, even accepting Plaintiffs’ agency allegations as true, under the *Merrill* Doctrine,  
 13 a federal instrumentality such as Fannie Mae cannot be held liable for the unauthorized actions  
 14 of its agents and independent contractors that it has not expressly authorized.

15 Third, Plaintiffs’ claims are entirely preempted under two different preemption doctrines.  
 16 The National Bank Act preempts Plaintiffs’ state law claims because the relief sought would  
 17 impose restrictions on Wells Fargo’s federally-granted powers related to requiring and obtaining  
 18 insurance, terms of credit, escrow accounts, and disclosure and implementation of fees. The filed  
 19 rate doctrine also preempts Plaintiffs’ claims: Florida’s Office of Insurance Regulation (“OIR”)  
 20 regulates the insurance rates upon which Plaintiffs base their claims.

21 Fourth, in addition to being barred by the *Merrill* doctrine and preempted, each of  
 22 Plaintiffs’ claims also fail to state facts sufficient to entitle them to relief against Fannie Mae.  
 23 There is no breach of contract or implied covenant stated because the alleged actions underlying  
 24 Plaintiffs’ claims are specifically allowed by the terms of the mortgage. Wells Fargo is obligated  
 25 under federal law to purchase flood insurance for Plaintiffs’ property when Plaintiffs fail or  
 26 refuse to do so. Plaintiffs agreed to this process in their mortgage and admit in their Amended  
 27 Complaint that this is “standard and appropriate.” Amd. Compl., at ¶ 2. Plaintiffs’ security  
 28 instrument also requires them to maintain flood insurance “in the amounts and for periods that

1 the Lender requires" and does not limit the amount that the lender may require to the loan  
 2 balance, allowing the lender to require coverage equal to the replacement cost of the home.  
 3 Plaintiffs also strain to convert the federally mandated insurance floor—flood insurance *at least*  
 4 equal to the loan balance—into a federally mandated ceiling—flood insurance of no more than  
 5 the loan balance. That interpretation is not supported by the applicable law.

6 Fifth, as a matter of law and based on the facts alleged, Fannie Mae does not have any  
 7 fiduciary duty to Plaintiffs.

8 Sixth, Fannie Mae cannot have violated the Real Estate Settlement Procedures Act, 12  
 9 U.S.C. §§ 2601 *et seq.* ("RESPA") or the Truth In Lending Act, 15 U.S.C. §§ 1601 *et seq.*  
 10 ("TILA") because Fannie Mae does not originate or service loans, post-origination LPI is not a  
 11 "settlement service" under RESPA, and Fannie Mae is not a "creditor" subject to TILA  
 12 requirements. In any event, Plaintiffs' TILA and RESPA claims are time-barred.

13 Finally, without a TILA or RESPA violation, or other "unlawful" or "unfair" acts by  
 14 Fannie Mae in the state of California, Plaintiffs have failed to sufficiently plead a violation of  
 15 California's Unfair Competition Law ("UCL"), Cal. Bus.& Prof. Code §§ 17200 *et seq.* and are  
 16 not entitled to equitable relief.

17 Fannie Mae also moves to strike Plaintiffs' jury demand because Plaintiffs expressly  
 18 waived all rights to a jury trial in executing their mortgage documents. *See* Ex. A to Amd.  
 19 Compl. ["Mortgage"], at §25.

20 In short, Plaintiffs' claims against Fannie Mae fail as a matter of law for the numerous  
 21 reasons stated in this Motion and should be dismissed in their entirety without leave to amend  
 22 and judgment entered in favor of Fannie Mae. If leave to amend is granted for any reason and as  
 23 to any claim, the jury demand should be stricken.

## 24 **II. FACTUAL AND PROCEDURAL BACKGROUND**

### 25 **A. Plaintiffs' Mortgage**

26 On September 9, 2005, Plaintiffs obtained a loan from Amerisave Mortgage Corporation  
 27 ("Amerisave"), the original lender, in the amount of \$128,000 for the purchase of a Florida  
 28 property; the loan was originally serviced by Ohio Saving Bank. Amd. Compl., at ¶¶ 27 & 32.

1 At closing, Plaintiffs obtained flood insurance sufficient for Amerisave to close on the loan. *Id.*  
 2 at ¶ 32. Plaintiffs' mortgage was later purchased by Fannie Mae on the secondary market and  
 3 servicing responsibilities were transferred to Wells Fargo Home Mortgage on or about February  
 4 1, 2005. *Id.* at ¶¶ 25, 27 & 33. Plaintiffs have not alleged that Fannie Mae had any direct  
 5 involvement with the origination of their loan, the servicing of their loan, or communications  
 6 regarding and placement of LPI. *See generally*, Amd. Compl. Rather, Plaintiffs' allegations  
 7 against Fannie Mae in each cause of action are based on the alleged conduct of the loan servicer,  
 8 Wells Fargo. *See* Amd. Compl. at ¶¶ 6, 9, 26, 87, 93, 94, 96, 121, 122, 124, 128, 129, 131, 132,  
 9 136, & 154.

10 Section 5 of Plaintiffs' mortgage provides that if Plaintiffs fail to maintain insurance  
 11 coverage on the property in the amount required by the lender, the lender may acquire such  
 12 coverage and charge the borrower for the cost of the coverage and other related amounts.

13 Property Insurance . . . This insurance shall be maintained in the  
 14 amounts . . . and for the periods that Lender requires. What Lender  
 15 requires pursuant to the preceding sentence can change during the  
term of the Loan. . . .

16 If Borrower fails to maintain any of the coverages described above,  
 17 Lender may obtain insurance coverage, at Lender's option and  
Borrower's expense. Lender is under no obligation to purchase any  
 18 particular type or amount of coverage. Therefore, such coverage  
shall cover Lender, but might or might not protect Borrower,  
Borrower's equity in the Property, or the contents of the Property,  
 19 against any risk, hazard or liability and might provide greater or  
lesser coverage than was previously in effect. Borrower  
 20 acknowledges that the cost of the insurance coverage so obtained  
might significantly exceed the cost of insurance that Borrower  
 21 could have obtained. Any amounts disbursed by Lender under this  
Section 5 shall become additional debt of Borrower secured by this  
 22 Security Instrument. These amounts shall bear interest at the Note  
 23 rate from the date of disbursement and shall be payable, with such  
 interest, upon notice from Lender to Borrower requesting payment.

24 Section 14 of the mortgage also dictated that the lender could charge fees not expressly  
 25 authorized by the mortgage to the extent not prohibited by the mortgage or applicable law.

26 Lender may charge borrower fees for services performed in connection  
 27 with Borrower's default, for the purpose of protecting Lender's interest  
 28 in the Property and rights under this Security Instrument, including, but  
 not limited to, attorneys' fees, property inspection and valuation fees. In  
 regard to any other fees, the absence of express authority in this Security

Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law. (emphasis added).

*Id.* at Ex. A, p. §§ 5 & 14 (emphasis added).

## **B. Plaintiffs' Allegations In The Amended Complaint**

Plaintiffs' Amended Complaint advances two main theories: (1) Defendants<sup>1</sup> forced Plaintiffs to "purchase and/or maintain flood insurance in excess of the amount required by federal law, in amounts greater than the note owner's secured interest in the property, and contrary to the amount agreed upon in the relevant loan and mortgage documents;" and (2) "Defendants" profited from an unearned kickback when "Defendants derive an improper financial benefit by charging residential borrowers for the 'cost' of procuring [LPI] from ASIC when a portion of such 'cost' is returned, transferred or paid to Wells Fargo or an affiliate" based on preset insurance arrangements. Amd. Compl., at ¶¶ 5 & 8. Plaintiffs do not allege that any portion of the fee or commission is remitted to Fannie Mae. *Id.* at ¶¶ 8-9.

**C. Flood Insurance Is Required By Federal Regulations, Which Set A Minimum Coverage Requirement**

Plaintiffs' home was located in a Special Flood Hazard Area. Am. Compl., at ¶31. Plaintiffs contend the maximum amount of flood insurance is limited to the "overall value of the property securing the loan minus the value of the land on which the property is located." *Id.* at ¶¶ 31 & 35. However, under the National Flood Insurance Act ("NFIA"), a federally regulated lending institution that extends credit for a property located in a special flood hazard area without requiring the purchase of mandatory flood insurance is subject to civil penalties, as is a lender that fails to provide notice of insufficient coverage or to purchase insurance when the borrower does not. 42 U.S.C. § 4012a(f). NFIA requires that "the building . . . and any personal

<sup>1</sup> Although Plaintiffs conclusorily group plead as to “Defendants,” the allegations are directed at actions by Wells Fargo, not Fannie Mae. *See, e.g.*, Amd. Compl., at ¶ 3 (“exploitative and self-dealing arrangement Wells Fargo engages in . . .”); ¶ 6 (“Wells Fargo charges borrowers’ mortgage escrow accounts”); ¶ 7 (“Wells Fargo requires all borrowers . . .”; “Wells Fargo force-placed Plaintiffs . . .”).

1 property securing such loan is covered for the term of the loan by flood insurance in an amount  
 2 **at least equal to** [a] the outstanding principal balance of the loan; or [b] the maximum limit of  
 3 coverage made available under the Act with respect to a particular type of property, **whichever is**  
 4 **less.**" 42 U.S.C. § 4012a(b)(1) (emphasis added). Thus, the regulation establishes a **minimum**  
 5 amount of flood insurance required, **not a maximum**, and does not prohibit setting Plaintiffs'  
 6 flood insurance coverage at FEMA's recommended limits, per the discretion allowed in the  
 7 mortgage.<sup>2</sup> Coverage in excess of the outstanding principal balance is therefore "at least equal  
 8 to" what NFIA requires, and so satisfies the statutory requirement.

9 **D. LPI Is Obtained For Plaintiffs' Property**

10 Fannie Mae incorporates by reference and joins in the Statement of Facts regarding the  
 11 LPI process in Wells Fargo's concurrently filed Motion to Dismiss and has only restated the key  
 12 facts and facts specific to Fannie Mae's involvement here.

13 In April 2006, Wells Fargo sent Plaintiffs a letter indicating that Plaintiffs' current flood  
 14 insurance was less than the coverage required by Wells Fargo and that the coverage level should  
 15 be equal to the replacement cost for the structure/improvements. Amd. Compl., at ¶ 37. The  
 16 letter requested Plaintiffs obtain the necessary coverage and provide proof of coverage to Wells  
 17 Fargo within 45 days. Wells Fargo's Request for Judicial Notice filed September 14, 2012  
 18 ("Wells Fargo's RJN"), Ex. A (April 6, 2005 letter). When Plaintiffs did not provided proof of  
 19 coverage within 45 days, Wells Fargo secured temporary LPI in the amount of \$79,200 for the  
 20 property and sent Plaintiffs notice that Wells Fargo had procured LPI. The notice explained that  
 21 the LPI could be canceled and Plaintiffs would only be charged for the days the policy was in  
 22 place, if Plaintiffs obtained their own policy. The notice urged Plaintiffs to do so because it was  
 23 likely that they could obtain coverage directly at a lower cost. The notice further provided that if

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25 <sup>2</sup> FEMA, which is responsible for implementing the federal government's National Flood  
 26 Insurance Program ("NFIP") (which was created by NFIA), has recommended that properties be  
 27 insured to their full replacement value as "[a] sound flood insurance risk management approach"  
 28 under which "the lender and borrower are both better protected." *See* Federal Emergency  
 Management Agency, National Flood Insurance Program: Mandatory Purchase of Flood  
 Insurance Guidelines at p. 27-28 (September 2007), *available at*  
[http://hazardmitigation.caema.ca/docs/10040\\_NFIP.pdf](http://hazardmitigation.caema.ca/docs/10040_NFIP.pdf)

1 Plaintiffs did not obtain coverage within 30 days, a one-year policy would be obtained. The  
 2 notice also advised that the premium for the LPI would be added to Plaintiffs' escrow  
 3 account. Amd. Compl., at ¶ 38; Wells Fargo's RJD, Ex. B (May 30, 2006 letter).

4 A similar process occurred in 2008, via letters from Wells Fargo to Plaintiffs on February  
 5 28, 2008, April 21, 2008, and May 29, 2008, which resulted in additional LPI of \$10,200 being  
 6 placed on Plaintiffs' property. Amd. Compl., at ¶¶ 39-40; Wells Fargo's RJD, Ex. C (April 21,  
 7 2008 letter).

8 Plaintiffs do not allege that Fannie Mae sent any correspondence to Plaintiffs regarding  
 9 LPI, made any determination of the amount of LPI required on Plaintiffs' property, made any  
 10 determination of the cost or source of the LPI, assessed any charges or fees to Plaintiffs  
 11 regarding LPI, received any payments from either Wells Fargo or Assurant as a result of the LPI  
 12 process, or in anyway directed or authorized Wells Fargo to take any specific action relating to  
 13 the LPI on Plaintiffs' property. *See generally*, Amd. Compl.

14 **E. Procedural History**

15 Plaintiffs filed their original complaint on March 19, 2012. Fannie Mae was not named  
 16 in the original complaint. [Dkt. No. 1] Wells Fargo moved to dismiss the original complaint on  
 17 July 2, 2012. [Dkt. No. 10]. In response, Plaintiffs filed the Amended Complaint on July 23,  
 18 2012, [Dkt. No. 21], naming Fannie Mae as a defendant and seeking to hold Fannie Mae  
 19 vicariously liable for the actions of Wells Fargo. In addition to the original counts for breach of  
 20 contract and the implied covenant of good faith and fair dealing, unjust enrichment, conversion,  
 21 and equitable relief, the Amended Complaint added claims for breach of fiduciary duty,  
 22 violations of TILA and RESPA, and violations of California's UCL.

23 **III. PLAINTIFFS' CLAIMS AGAINST FANNIE MAE SHOULD BE DISMISSED  
 24 PURSUANT TO FED. R. CIV. P. I2(B)(6) FOR FAILING TO STATE A CLAIM  
 25 UPON WHICH RELIEF CAN BE GRANTED**

26 **A. Applicable Legal Standards**

27 A motion to dismiss tests the legal sufficiency of the claims alleged in the complaint.  
 28 *Carroll v. City of Hercules*, No. C-11-3378 EMC, 2012 U.S. Dist. LEXIS 47187, at \*2 (N.D.  
 Cal. Apr. 3, 2012). A claim is properly dismissed for lack of a cognizable legal theory, absence

1 of sufficient facts alleged under a cognizable legal theory, or for seeking remedies to which a  
 2 plaintiff is not entitled as a matter of law. *Levitt v. Yelp!, Inc.*, No. C-10-1321 EMC, 2011 U.S.  
 3 Dist. LEXIS 124082, at \*14 (N.D. Cal. Oct. 26, 2011); *Balistreri v. Pacifica Police Dept.*, 901  
 4 F.2d 696, 699 (9th Cir. 1988); *King v. California*, 784 F.2d 910, 913 (9th Cir. 1986).

5 The Federal Rules of Civil Procedure require that a complaint include "enough facts to  
 6 state a claim to relief that is plausible on its face." *Bell Atl. Co. v. Twombly*, 550 U.S. 544, 570,  
 7 127 S.Ct. 1955, 1974 (2007). To be plausible, a complaint must contain factual allegations  
 8 sufficient to "raise a right to relief above the speculative level." *Id.* at 1965. A plaintiff must  
 9 plead sufficient facts "to provide the 'grounds' of his 'entitle[ment] to relief,' [which] requires  
 10 more than labels and conclusions, and [for which] a formulaic recitation of the elements of a  
 11 cause of action will not do." *Id.* at 1964-65 (citation omitted). Thus, a complaint cannot simply  
 12 "le[ave] open the possibility that a plaintiff might later establish some 'set of undisclosed facts'  
 13 to support recovery." *Id.* at 1968 (citation omitted). Rather, the facts set forth in the complaint  
 14 must be sufficient to "nudge the [ ] claims across the line from conceivable to plausible." *Id.* at  
 15 1974. "A claim has facial plausibility when the plaintiff pleads factual content that allows the  
 16 court to draw reasonable inferences that the defendant is liable for the misconduct alleged."  
 17 *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009). Furthermore, courts will not  
 18 assume that a plaintiff can prove facts beyond those alleged in the complaint. *See Assoc. Gen.*  
 19 *Contractors of Cal. v. Ca. State Council of Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897  
 20 (1983).

21 Although facts properly alleged must be construed in favor of the plaintiff, "conclusory  
 22 allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss."  
 23 *Associated Gen. Contractors v. Metro. Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998) (citation  
 24 omitted). As the Supreme Court said, "the tenet that a court must accept as true all of the  
 25 allegations of a complaint is inapplicable to legal conclusions. Threadbare recitals of the  
 26 elements of a cause of action, supported by mere conclusory allegations, do not suffice." *Iqbal*,  
 27 129 S.Ct. 1937, 1949. "[T]he court is not required to accept legal conclusions cast in the form of  
 28 factual allegations if those conclusions cannot reasonably be drawn from the facts alleged."

1      *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Finally, courts are not  
 2 required to accept as true “allegations contradicted by documents referred to in the complaint.”  
 3 *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009) (citation omitted).

4      **B.      Fannie Mae Is Not Liable For Wells Fargo’s Conduct**

5      **(1)      *Wells Fargo Is Not Fannie Mae’s Agent***

6      As a threshold matter, Fannie Mae is not liable for the alleged acts or omissions of Wells  
 7 Fargo because Wells Fargo is not Fannie Mae’s legal agent under either Florida agency law or  
 8 the express terms of the loan servicer agreement between Wells Fargo and Fannie Mae.<sup>3</sup>  
 9 Plaintiffs plead no facts alleging any relationship between Fannie Mae and Assurant. *See Amd.*  
 10 *Compl.*, at ¶¶ 20-26 & 53.

11      Under Florida law, agency requires the following essential elements: “(1)  
 12 acknowledgement by the principal that the agent will act for him, (2) the agent’s acceptance of  
 13 the undertaking, and (3) control by the principal over the actions of the agent.” *Gillet v.*  
 14 *Watchtower Bible & Tract Soc’y of Pa., Inc.*, 913 So. 2d 618, 620 (Fla. Dist. Ct. App. 3d Dist.  
 15 2005) (citing *Goldschmidt v. Holman*, 571 So. 2d 422, 424 n.5 (Fla. 1990)). An apparent agency  
 16 exists only if each of three elements is present: “(a) a representation by the purported principal;  
 17 (b) a reliance on that representation by a third party; and (c) a change in position by the third  
 18 party in reliance on the representation.” *See Mobil Oil Corp. v. Bransford*, 648 So. 2d 119, 121  
 19 (Fla. 1995). In the absence of any one of these elements, an agency relationship will not be  
 20 found. *Id.*

21      Here, Plaintiffs allege only the ultimate legal conclusion that Wells Fargo is Fannie  
 22 Mae’s agent, without pleading the specific elements required under *Iqbal* or Florida law to  
 23 establish either an express or apparent agency relationship. The mere possibility of such is not  
 24 enough. *See Iqbal*, 129 S.Ct. at 1947-1950. Plaintiffs do not allege that Fannie Mae had any  
 25 direct involvement with the LPI process and do not allege that Fannie Mae directed or authorized

26  
 27      <sup>3</sup> Per its terms, the mortgage is governed by federal law and the law of the state in which the  
 28 property is located; here, Florida. *Amd. Compl.*, Ex. A, ¶ 16.

1 any of Wells Fargo's allegedly unlawful conduct. Plaintiffs simply present bald allegations that  
2 Fannie Mae is vicariously liable for Wells Fargo's actions. *See* Amd. Compl., at ¶ 20-26.

3 Nor can Plaintiffs amend to state such claims. The publicly-available applicable  
4 Servicing Guide issued by Fannie Mae specifically states that loan servicers are independent  
5 contractors and not agents of Fannie Mae. *See* Fannie Mae’s Single Family 2006 and 2011  
6 Servicing Guides (collectively “Servicing Guide”), Exhibit A to Fannie Mae’s Request for  
7 Judicial Notice (“Fannie Mae’s RJN”).<sup>4</sup> Wells Fargo is not Fannie Mae’s agent and the claims  
8 predicated against Fannie Mae on such basis must be dismissed.

(2) *Under The Merrill Doctrine, Fannie Mae Is Not Liable For The Unauthorized Acts Of Its Agents And Independent Contractors, Compelling That All Of Plaintiffs' Claims Against Fannie Mae Be Dismissed*

12 Even if the Court declines to hold that Wells Fargo is not Fannie Mae’s agent, the claims  
13 against Fannie Mae must still be dismissed. Under the *Merrill* doctrine, a federal instrumentality  
14 cannot be held liable for the actions of its agents and independent contractors that it has not  
15 expressly authorized. *Hinton v. Fed. Nat Mortgage Ass’n*, 945 F. Supp. 1052, 1060 (S.D. Tex.  
16 1996) (*citing Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 n.1 (1947)), *aff’d*, 137 F.3d  
17 1350 (5th Cir. 1998). Fannie Mae is a federal instrumentality. *Id.*; *In re Fannie Mae 2008 Secs.*  
18 *Litig.*, No. 08-7831, 2009 WL 4067259, at \*3 (S.D.N.Y. Nov. 24, 2009). All claims against  
19 Fannie Mae should therefore be dismissed because Plaintiffs have not alleged that Fannie Mae  
20 expressly authorized the acts of Wells Fargo that are the subject of Plaintiffs’ Amended  
21 Complaint. In particular, Plaintiffs do not allege that Fannie Mae was involved in the decision or  
22 process of providing LPI to Plaintiffs. Plaintiffs have not alleged that Fannie Mae received any  
23 benefit or alleged kickback from the LPI. Indeed, none of Plaintiffs’ claims arise from any  
24 affirmative acts of Fannie Mae. Rather, Plaintiffs’ allegations against Fannie Mae in each cause

<sup>26</sup> <sup>4</sup> The relevant portions of Fannie Mae's 2006 and 2011 Servicing Guides relating to Fannie  
27 Mae's relationship with its servicers, the servicers' basic duties and responsibilities, flood  
28 insurance coverage for first mortgages, and LPI have not materially changed during the 2006-  
2011 time frame covering the conduct alleged by Plaintiffs as evidence by the section attached to  
Fannie Mae's RJD as Exhibit A.

1 of action are based on the conduct of the loan servicer, Wells Fargo. *See* Amd. Compl. at ¶¶ 6,  
 2 9, 26, 87, 93, 94, 96, 121, 122, 124, 128, 129, 131, 132, 136, & 154.<sup>5</sup>

3                   a)     Fannie Mae Is A Federal Instrumentality

4                   Fannie Mae is a creation of the federal government. As the three judge panel in *Federal*  
 5 *National Mortgage Association v. Lefkowitz* explained, “[a] glance at the federal legislation  
 6 involved, 12 U.S.C. § 1716 *et seq.* [Fannie Mae's charter], leaves little doubt that Congress  
 7 intended [Fannie Mae] to be recognized as a federal instrumentality.” 390 F. Supp. 1364, 1368  
 8 (S.D.N.Y. 1975). “Fannie Mae is a governmental instrumentality because of its fundamental  
 9 government-like attributes.” *In re Fannie Mae 2008 Secs. Litig.*, 2009 WL 4067259, at \*3.  
 10 Fannie Mae's charter provides that its principal purpose is “to establish secondary market  
 11 facilities for residential mortgages.” 12 U.S.C. § 1716. The charter also provides that Fannie Mae  
 12 is controlled by the Secretary of the Treasury with respect to certain financial transactions, has  
 13 Congressional “immunity from state taxation,” and “performs a significant governmental  
 14 function in its secondary mortgage market operations.” *Lefkowitz*, 390 F. Supp. at 1368  
 15 (statutory citations omitted); *accord Kidder Peabody & Co. v. Unigestion Int'l, Ltd.*, 903 F.  
 16 Supp. 479, 495-96 (S.D.N.Y. 1995). Fannie Mae, as a “government-sponsored” enterprise, “is  
 17 subject to the general regulatory power of a government agency;” is “exempted . . . from having  
 18 to qualify to do business in any state”; is “cloaked . . . with immunity from state taxation”; and  
 19 “performs a significant governmental function in its secondary mortgage market operations.”  
 20 *Lefkowitz*, 390 F. Supp. at 1368; *accord Hinton*, 945 F. Supp. at 1060 (Fannie Mae is federal  
 21 instrumentality for *Merrill* purposes); *In re Fannie Mae 2008 Secs. Litig.*, 2009 WL 4067259, at  
 22 \*3 (Fannie Mae is federal instrumentality for purposes of exemption from 1933 Securities Act);  
 23 *Rust v. Johnson*, 597 F.2d 174, 177 (9th Cir. 1979) (Fannie Mae is a federal instrumentality for  
 24

25                   <sup>5</sup> Despite stating in Paragraph 9 of the Amended Complaint that “Fannie Mae is directly liable to  
 26 Plaintiffs for its own wrongful conduct,” the Amended Complaint lacks any specific allegations  
 27 of wrongful acts performed by Fannie Mae. Further, the *Merrill* doctrine requires more than a  
 28 failure to take some action that might have prevented unauthorized conduct as alleged in  
 Paragraph 93 of the Amended Complaint. *Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132,  
 1142 (7th Cir. 1992).

1 tax purposes); *see also Deerman v. Fed. Home Loan Mortgage Corp.*, 955 F. Supp. 1393, 1400  
2 (N.D. Ala. 1997) (Freddie Mac is a federal instrumentality for *Merrill* purposes), *aff'd*, 140 F.3d  
3 1043 (11th Cir. 1998); *Paslowski v. Standard Mortgage Corp.*, 129 F. Supp. 2d 793, 799-801  
4 (W.D. Pa. 2000) (same).<sup>6</sup>

b) Federal Instrumentalities Are Immune From Liability For The Unauthorized Action Of Their Agents

7 The controlling law on the issue of immunity for federal instrumentalities was set forth  
8 by the Supreme Court in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). The plaintiffs  
9 in *Merrill* applied for insurance under the Federal Crop Insurance Act to cover their wheat  
10 farming operations. Agents of the Federal Crop Insurance Corporation (“FCIC”) erroneously  
11 informed the plaintiffs that their entire wheat crop was insurable, when in fact federal regulations  
12 prohibited the FCIC from insuring the “reseeded” portion of the crop. When the crop was later  
13 destroyed by drought, the FCIC refused to provide full compensation and the plaintiffs sued. The  
14 Court held that the FCIC’s status as a federal instrumentality precluded recovery by the plaintiff:  
15 “[T]he rules of law whereby private insurance companies are rendered liable for the acts of their  
16 agents are not bodily applicable to a Government agency like the [FCIC], unless Congress has so  
17 provided.” *Id.* at 383 n.1. The Court reasoned that Congress had chosen to pursue important  
18 government objectives through the FCIC and to that end had delegated to the FCIC certain  
19 powers, including the power to set the terms and conditions for government crop insurance. The  
20 Court held that “[t]he ‘terms and conditions’ defined by the [FCIC], under authority of Congress,  
21 for creating liability on the part of the Government preclude recovery for the loss of the reseeded  
22 wheat no matter with what good reason respondents thought they had obtained insurance from  
23 the Government.” *Id.* at 385.

24 In the ensuing decades since the Supreme Court's ruling in *Merrill*, courts have held that  
25 Fannie Mae has no liability for the actions taken by its loan servicers because of Fannie Mae's

<sup>27</sup> <sup>28</sup> <sup>6</sup> Courts treat Fannie Mae and Freddie Mac alike under *Merrill* because the two entities have similar congressionally mandated structures. See, e.g., *Herrod, v. First Republic Mortgage Corp., et al.*, No. 01C-2907, slip op. at 8 (Kanawha County Cir. Ct. W. Va. June 23, 2004).

status as a federal instrumentality. *See, e.g., Hinton*, 945 F. Supp. at 1060; *Herrod v. First Republic Mortgage Corp., et al.*, No. 01C-2907, slip op. at 8-10 (Kanawha County Cir. Ct. W. Va. June 23, 2004) (explaining *Merrill*, granting summary judgment in favor of Fannie Mae, and dismissing complaint against Fannie Mae in its entirety); *Deerman*, 955 F. Supp. at 1401 (Freddie Mac); *Paslowski*, 129 F. Supp. 2d at 799 (Freddie Mac).

c) To The Extent Any Action By Wells Fargo Was Contrary To Law, It Was Not Expressly Authorized By Fannie Mae

Even assuming arguendo that Wells Fargo is Fannie Mae's agent—which it is not, as discussed above—Plaintiffs' claims fail. Fannie Mae's unique status as a federal instrumentality precludes liability for the acts of Wells Fargo as the servicer of Plaintiffs' mortgage, if the actions of Wells Fargo were not authorized by Fannie Mae. *Hinton v. Fed. Nat'l Mortgage Ass'n*, 945 F. Supp. at 1060 (“as a federal instrumentality, [Fannie Mae] cannot be held liable for the acts . . . that is has not expressly authorized”); *see also Deerman*, 955 F. Supp. at 1400 (dismissing claim against Freddie Mac for actions of its servicer under *Merrill*); *Paslowski*, 129 F. Supp. 2d at 804-05 (same); *Mendrala*, 955 F.2d at 1140-41 (applying the *Merrill* doctrine to protect Freddie Mac from the unauthorized acts of its loan servicers); *Siradas v. Chase Lincoln First Bank, NA.*, No. 98 Civ. 4028, 1999 WL 787658, at \*8 (S.D.N.Y. Sept. 30, 1999); *Dupuis v. Fed. Home Loan Mortgage Corp.*, 879 F. Supp. 139, 145 (D. Me. 1995); *Rust*, 597 F.2d at 178. Actions are unauthorized where, for example, a servicing guide specifically prohibits an action yet the servicer takes that action. *See, e.g., Mendrala*, 955 F.2d at 1139. But actions can also be unauthorized where those with specific authority act outside the scope of that authority. *See Paslowski*, 129 F. Supp. 2d at 800 (“[I]t is well-settled that ‘only those with specific authority can bind the government contractually; even those persons may do so only to the extent that their authority permits.’” (citation omitted)). The *Merrill* doctrine requires more than a failure to take some action that might have prevented unauthorized conduct. *Mendrala*, 955 F.2d at 1142.

27 Fannie Mae's Servicing Guide does require servicers to provide LPI if the borrower fails  
28 to do so; however, it gives Wells Fargo discretion in the performance of their duties. Moreover,

1 Fannie Mae's Servicing Guide specifically states that its LPI guidelines should be applied  
 2 "subject to the provisions of and in compliance with applicable law and the mortgage  
 3 documents." See Fannie Mae's RJD, Ex. A. Plaintiffs do not allege that Fannie Mae authorized  
 4 the alleged misconduct by Wells Fargo when it provided LPI to Plaintiffs. Indeed, if Wells  
 5 Fargo's actions were contrary to the law, they were expressly unauthorized by Fannie Mae's  
 6 Servicing Guide, which requires its servicers to comply with applicable law. Moreover, the  
 7 allegations of the Amended Complaint state that Wells Fargo and Assurant initiated this process  
 8 based on their coverage monitoring program. See Amd. Compl. at ¶¶ 21, 23, & 55. In fact,  
 9 Plaintiffs have not alleged that Fannie Mae gave Wells Fargo any instructions at all regarding  
 10 LPI, let alone express authorization to undertake the alleged actions.

11 As the gravamen of Plaintiffs' claims relate to the LPI process, a process in which Fannie  
 12 Mae had no direct involvement and for which Fannie Mae did not direct or authorize any of  
 13 Wells Fargo's allegedly unlawful conduct, all of Plaintiffs' claims against Fannie Mae must be  
 14 dismissed without leave to amend because amendment would be futile as to Fannie Mae in light  
 15 of the *Merrill* doctrine.

16 **C. Plaintiffs' Claims Are Barred By The National Bank Act And The Filed Rate  
 17 Doctrine**

18 **(1) Plaintiffs' Claims Against Wells Fargo, For Which Plaintiffs Attempt  
 19 To Hold Fannie Mae Liable, Are Preempted By The National Bank Act**

20 Fannie Mae incorporates by reference as if fully set forth herein and joins in Wells  
 21 Fargo's and Assurant's arguments in their concurrently filed Motions to Dismiss the Amended  
 22 Complaint that Plaintiffs' claims must be dismissed because they are preempted by the federal  
 23 National Bank Act ("NBA"). 12 U.S.C. § 21 *et seq.* Again, none of the unlawful conduct set  
 24 forth in the Amended Complaint is alleged to have been performed directly by or at the direction  
 25 of Fannie Mae. To the extent the Court finds that the claims against Wells Fargo, a national  
 26 bank, are preempted by the NBA, the Court should similarly find that the preemption extends to  
 Fannie Mae; there is no direct liability alleged against Fannie Mae.

27 The activities at issue are essential to Wells Fargo's ability to carry out its federal  
 28 banking activities, including the servicing of mortgage loans and the insuring of those loans'

1 collateral. For preemption purposes, it is the banking activity being regulated rather than the  
 2 actor being regulated that matters. *See* 12 C.F.R. § 34.4; *SPGGC, LLC v. Ayotte*, 488 F.3d 525,  
 3 532 (1st Cir. 2007); *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 353 (2d Cir. 2008).  
 4 Plaintiffs' claims focus on the pricing of LPI, the fees received by Wells Fargo in connection  
 5 with LPI, and the imposition of LPI itself. These claims directly conflict with the NBA laws and  
 6 regulations that prohibit states from imposing requirements on Wells Fargo's ability to "require  
 7 or obtain private mortgage insurance," 12 C.F.R. § 34.4(a), impose and charge fees, 12 C.F.R. §  
 8 §7.40002(a), and to disclose information in connection with its lending activities, 12 C.F.R. §  
 9 34.4(a). Plaintiffs claims are therefore entirely preempted by the NBA and should be dismissed.

10 **(2) *The Filed Rate Doctrine Precludes Liability***

11 Fannie Mae incorporates by reference and joins in Wells Fargo's and Assurant's  
 12 arguments in their concurrently filed Motion to Dismiss the Amended Complaint to the extent  
 13 that Plaintiffs' count for breach of contract is based on the imposition of supposedly "excessive"  
 14 and "unreasonable" premiums—despite the contract informing Plaintiffs that LPI would cost  
 15 more than coverage obtained directly by borrowers. The premiums charged are based upon a  
 16 rate filed, and approved by, Florida's Office of Insurance Regulation, the agency appointed to  
 17 regulate premium rates. Each claim against Assurant, and any liability that might flow to Wells  
 18 Fargo and to Fannie Mae, is thus barred by Florida's filed rate doctrine, which provides that a  
 19 filed rate is *per se* reasonable and unassailable in judicial proceedings. *See Morales v. Attorneys'*  
 20 *Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429-30 (S.D. Fla. 1997); *Uniforce Temporary*  
 21 *Personnel, Inc. v. Nat'l Council on Compensation Ins., Inc.*, 892 F. Supp. 1503, 1512 (S.D. Fla.  
 22 1995), *aff'd*, 78 F.3d 1296 (11th Cir. 1996).

23 **D. Plaintiffs Fail To State A Claim Against Fannie Mae Upon Which Relief Can  
 24 Be Granted**

25 **(1) *Plaintiffs' Breach of Contract And Breach Of The Implied Covenant of  
 26 Good Faith And Fair Dealing Claims Fail***

27 To state a claim for breach of contract under Florida law, a plaintiff must allege a valid  
 28 contract, a material breach, and resulting damages. *AmerisourceBergen Drug Corp. v. Izz &  
 Sons, Inc.*, No. 11-cv-23895, 2012 U.S. Dist. LEXIS 121865, at \*10 (S.D. Fla. Aug. 28, 2012);

1 *Friedman v. N.Y. Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008). “The implied covenant of  
 2 good faith and fair dealing applies to every contract.” *Meruelo v. Mark Andrew of Palm Beaches,  
 3 Ltd.*, 12 So. 3d 247, 250 (Fla. 4th DCA 2009). “The **implied covenant** of good faith and fair  
 4 dealing does not, however, vary the express terms of a **contract**, . . . but, rather, attaches to the  
 5 performance of specific contractual obligations.” *Mount Sinai Medical Center of Greater Miami,  
 6 Inc. v. Heidrick & Struggles, Inc.*, 188 Fed. Appx. 966, 970 (11th Cir. 2006) (citations and  
 7 quotations omitted). “Under Florida law, a party breaches this implied covenant by a failure or  
 8 refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad  
 9 judgment or negligence; but, rather by a conscious and deliberate act, which unfairly frustrates  
 10 the agreed common purpose and disappoints the reasonable expectations of the other party.”  
 11 *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Companies*, 607 F.3d 742, 747 (11th Cir.  
 12 2010) (internal marks omitted). As with the rest of the Amended Complaint, Plaintiffs claims  
 13 against Fannie Mae for breach of contract and the implied covenant of fair dealing are based  
 14 solely on Wells Fargo’s actions, but are brought against Fannie Mae because Fannie Mae  
 15 allegedly “owns their note and is responsible for all actions of its agent, Wells Fargo.” Amd.  
 16 Compl, at ¶ 87; *see also id.*, at ¶ 93-94, 98. Accordingly, Fannie Mae incorporates by reference  
 17 and joins in Wells Fargo’s Motion to Dismiss arguments regarding Plaintiffs’ failure to state a  
 18 claim for breach of contract and breach of the implied covenant of good faith and fair dealing at  
 19 IV.B.1 and 2. If there is no liability against Wells Fargo, Fannie Mae cannot be held vicariously  
 20 liable for the same alleged acts. Moreover, as discussed above, Plaintiffs’ breach of contract  
 21 claim against Fannie Mae, based solely on the alleged actions of Wells Fargo, is barred by the  
 22 *Merrill* doctrine.

23 Plaintiffs do not allege Fannie Mae breached the mortgage contract by its own actions or  
 24 directly caused damage to Plaintiffs. *See* Amd. Compl., at ¶¶ 94, 98 (“Fannie Mae, acting  
 25 through its servicing agent Wells Fargo, breached the express terms of the mortgage contract . . .  
 26 .” “Plaintiffs and the Classes have suffered damages as a result of Wells Fargo’s breach of  
 27 contract and breach of the implied covenant of good faith and fair dealing. . . .”). Nor can  
 28 Plaintiff state a breach of contract for “failure to intervene.” *See* Amd. Compl., at ¶ 93 (“Wells

1 Fargo's actions were known or should have been known to Fannie Mae which failed to intervene  
2 . . ."). Plaintiffs fail to allege any express contract term that would require Fannie Mae to  
3 perform as alleged by Plaintiffs (to intervene), nor do they allege any "conscious and deliberate  
4 act" required under Florida law to survive dismissal of the implied covenant claim. *Tiara*  
5 *Condominium Ass'n, Inc.*, 607 F.3d at 747. Plaintiffs' contention that Fannie Mae breached the  
6 contract because Wells Fargo "exercised its discretion capriciously" to also fails as a matter of  
7 law. Amd. Compl., at ¶ 97. "With the implied covenant, one party cannot capriciously exercise  
8 discretion accorded it under a contract so as to thwart the contracting parties' reasonable  
9 expectations. Yet, the limit placed on a party's discretion is not great. *Sembler Family P'ship #*  
10 *41 v. Brinker Fla., Inc.*, 660 F. Supp. 2d 1307, 1313 (M.D. Fla. 2009) (internal citations  
11 omitted); *see also Burger King Corp. v. Ashland Equities, Inc.*, 217 F. Supp. 2d 1266, 1278 (S.D.  
12 Fla. 2002) (noting that "[u]nder Florida law, the limit placed on a party's discretion is not great"  
13 and that "a party's decision will not violate the implied covenant of good faith and fair dealing  
14 unless no reasonable party would have made the same discretionary decision") (citations and  
15 quotations omitted). Plaintiffs admit the plain language of Section 5 of the mortgage permitted  
16 the servicing agent to select the force-placed insurer and the rate. Amd. Compl. at ¶ 96. As a  
17 result, the breach of contract count must be dismissed as against Fannie Mae.

**(2) Plaintiffs Cannot Maintain A Claim For Breach Of Fiduciary Duty Against Fannie Mae**

The elements of a claim for breach of fiduciary duty are: "the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." *Patten v. Winderman*, 965 So. 2d 1222, 1224 (Fla. Dist. Ct. App. 4th Dist. 2007). Plaintiffs' count for breach of fiduciary duty suffers from several fatal flaws. First, it fails to allege facts giving rise to a fiduciary duty on Fannie Mae's part—Fannie Mae did not directly hold or operate Plaintiffs' escrow account. Second, in Florida, generally the relationship between a bank and its borrower is that of creditor to debtor, in which parties engage in arms-length transactions, and the bank owes no fiduciary responsibilities. *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176 (S.D. Fla. 1991). Third, the Amended Complaint alleges only that Wells Fargo held

1 escrowed funds for the purpose of paying insurance premiums; Fannie Mae did not hold funds or  
 2 administer Plaintiffs' escrow account. Amd. Compl., at ¶ 119. That is insufficient as a matter of  
 3 law to create a fiduciary relationship. “[W]hen the escrow agreement simply provides for the  
 4 payment of funds by the mortgagor into an account for the mortgagee’s use to meet tax,  
 5 insurance, and other obligations—as appears to be the case here—no fiduciary relationship is  
 6 created.” *See Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304, 318-10 & n. 27 (5th Cir.  
 7 2005); *White v. Mellon Mortg. Co.*, 995 S.W.2d 795, 801 (Tex.App.-Tyler 1999, no pet.) (*citing*  
 8 *Wesson v. Jefferson Sav. & Loan Ass’n*, 641 S.W.2d 903, 905 n. 2 (Tex.1982)). Plaintiffs  
 9 assert that a fiduciary relationship existed between Plaintiffs and Fannie Mae because Fannie  
 10 Mae, through its servicing agent Wells Fargo, received a “greater economic benefit than from a  
 11 typical escrow transaction,” citing *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 519 (Fla.3d DCA  
 12 1994). Amd. Compl., at ¶ 121. Plaintiffs’ citation to *Capital Bank* is misleading and completely  
 13 distinguishable. First, *Capital Bank* does not relate to the operation and maintenance of an  
 14 escrow account. The words “escrow” or “escrow account,” are not mentioned. *See generally*,  
 15 *Capital Bank*, 644 So. 2d 515. Second, the economic benefit discussed in *Capital Bank* was  
 16 completely unrelated to functions of an escrow account. The court’s imposition of a fiduciary  
 17 duty in that case was based on the bank’s benefit derived from convincing the borrower to  
 18 purchase the assets of another company which relieved the bank from a loss on a non-  
 19 performing loan. *Id.* at 520. Here, Plaintiffs do not allege that Fannie Mae received a greater  
 20 economic benefit than from a typical escrow transaction.

21 Finally, Plaintiffs fails to allege any breach of duty, assuming Fannie Mae owed one. It  
 22 was no breach of duty to buy LPI in excess of loan balance, pay for it from escrowed funds, or  
 23 charge a LPI fee. The escrow account was established for the express purpose of paying  
 24 insurance premiums. By signing their security instruments, Plaintiffs expressly allowed exactly  
 25 this conduct. Amd. Compl., Ex. A, at p. 5-6 & 9. This claim therefore fails as a matter of law.

26 (3) ***Plaintiffs Fail To State A RESPA Claim Because Fannie Mae Is Not***  
 27 ***Subject To 12 U.S.C. § 2607 And Has Not Received A Split Of Any***  
 28 ***Charge to Plaintiffs***

1       RESPA is an anti-kickback statute that is applicable solely to the residential real estate  
 2 industry. *See* 12 U.S.C. § 2607(a) and (b).

3       Plaintiffs' RESPA claim fails as a matter of law for four reasons. First, RESPA only  
 4 applies to the duties of loan originators and servicers. *See* 12 U.S.C. §2605. The Amended  
 5 Complaint admits that Amerisave Mortgage Corporation was the originator, Ohio Savings Bank  
 6 was the original servicer; and Wells Fargo is the current servicer of Plaintiffs' loan. Amd.  
 7 Compl., at ¶¶ 21, 27 & 31. Plaintiff does not allege that Fannie Mae either originated or services  
 8 their loan. Moreover, Fannie Mae is excluded from the definition of "servicer" under RESPA,  
 9 *see* 12 U.S.C. §2605(i)(2)(B), and Fannie Mae is precluded from originating loans, *see* 12 U.S.C.  
 10 § 1719(a)(2). Because Fannie Mae was neither the originator nor servicer of Plaintiffs' loan, it  
 11 cannot be held liable under RESPA. *See Kee v. Fifth Third Bank*, No. 06-0602, 2009 U.S.  
 12 District LEXIS 21502, at \*33 (D. Utah Mar. 18, 2009) (dismissing RESPA claim against Fannie  
 13 Mae because RESPA applies to servicer of loan, not owner of note).

14       Second, Plaintiffs' RESPA claim should be dismissed because RESPA, by its terms,  
 15 applies only to "real estate settlement services." 12 U.S.C. §2607(a)-(b). This district has  
 16 expressly held that post-origination LPI is not a "settlement service." *See McNeary-Calloway v.*  
 17 *JP Morgan Chase Bank, N.A.*, No. C11-3058, 2012 WL 1029502, at \*20-21 (N.D. Cal. Mar. 26,  
 18 2012) (if purchased after loan origination, force-placed insurance is not a "settlement service"  
 19 under RESPA); *Gens v. Wachovia Mortg. Corp.*, No. C10-1073, 2011 WL 1791601, at \*6 (N.D.  
 20 Cal. May 10, 2011). RESPA defines a "settlement service" as "any service provided in  
 21 connection with a real estate settlement . . ." 12 U.S.C. §2602(3) (emphasis added). The  
 22 Department of Urban Development ("HUD"), which is charged with implementing RESPA, has  
 23 promulgated regulations defining "settlement" as "the process of executing legally binding  
 24 document regarding a lien on property that is subject to a federally related mortgage loan. This  
 25 process may also be called 'closing' or 'escrow' in different jurisdictions." 24 C.F.R.  
 26 § 3500.2(b).<sup>7</sup> By its terms, then, RESPA is narrow in scope, applying only to services rendered

27  
 28 <sup>7</sup> Absent clear and countervailing statutory authority, HUD's regulations are to be accorded  
 substantial deference under *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).

1 at or in connection with a loan closing. Accordingly, as numerous cases have concluded, fees or  
 2 charges assessed for services performed long after a loan's closing do not fall within RESPA's  
 3 narrow scope. *See, e.g., Bloom v. Martin*, 77 F.3d 318, 321 (9th Cir. 1996) (RESPA "does not  
 4 focus on post-settlement fees paid by mortgagors after they have purchased their houses").  
 5 Indeed, as HUD explained in an opinion letter in 1987, RESPA is "directed to practices  
 6 preceding or accompanying the settlement and not to post-settlement practices, such as  
 7 [insurance policies which are renewed in subsequent years]." *See Letter, June 26, 1987,*  
 8 *reprinted in* Paul Barron, *Federal Regulation of Real Estate and Mortgage Lending* App. 2-84  
 9 (1992 & Supp. 1993) (emphasis added).

10 Plaintiffs obtained their loan in September 2005 and obtained some flood insurance at  
 11 that time. Amd. Compl., at ¶¶ 27 & 32. The LPI procured by Wells Fargo at issue here is not a  
 12 "settlement service" governed by RESPA and was not placed on Plaintiffs' property until May  
 13 2006. *Id.* at ¶ 38. In fact, as admitted, Plaintiffs' loan was closed by a different lender with a  
 14 different servicer and did not involve the LPI in question. Plaintiffs' LPI payments are simply  
 15 not a service provided in connection with "the process of executing legally binding document  
 16 regarding a lien on property." 24 C.F.R. § 3500.2(b).

17 Third, while not completely clear, the Amended Complaint apparently asserts that Wells  
 18 Fargo violated Section 8 of RESPA, 12 U.S.C. §2607(a)-(b)<sup>8</sup> by accepting a commission or  
 19 kickback in connection with the LPI and/or by accepting a split of the LPI premium. Amd.  
 20 Compl., at ¶ 153. This claim also fails as to Fannie Mae because Plaintiffs have not alleged, and  
 21 cannot allege, that Fannie Mae received any payment, commission or kickback, or any other

22  
 23  
 24 <sup>8</sup> Section 2607(a) provides that "no person shall give and no person shall accept any fee,  
 25 kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that  
 26 business incident to or a part of a real estate settlement service involving a federally related  
 27 mortgage loan shall be referred to any person."  
 28

Section 2607(b) provides that "no person shall give and no person shall accept any portion, split,  
 or percentage of any charge made or received for the rendering of a real estate settlement service  
 in connection with a transaction involving a federally related mortgage loan other than for  
 services actually performed."

1 benefit, in association with the LPI transaction. Absent receiving a fee, kickback, or split, Fannie  
2 Mae cannot have violated RESPA.

Finally, the RESPA claim alternatively fails because this action was not commenced within “1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation.” 12 U.S.C. § 2614. The phrase “the date of the occurrence of the violation” refers to the date of the loan closing. *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 359 (5th Cir. 2003); *Holt v. First Franklin Fin. Corp.*, No. C10-5929, 2011 WL 4595195, at \*3 (N.D. Cal. Sept. 30, 2011); *Washington v. Nat'l City Mortg. Co.*, No. C10-5042, 2011 WL 1842836, at \*7 (N.D. Cal. May 16, 2011). Here, that date is September 9, 2005. Amd. Compl. ¶ 27. This suit was filed on March 19, 2012, and thus is time-barred on the Amended Complaint’s face.

12 For all of the above reason, Plaintiffs' RESPA claim against Fannie Mae fails as a matter  
13 of law and must be dismissed.

**(4) Plaintiffs' TILA Claim Fails Because TILA Is Not Applicable To Fannie Mae Under These Facts, The Claim Is Time Barred, And No TILA Violation Occurred**

16 The federal Truth In Lending Act (“TILA”) and its implementing regulations require  
17 creditors to make certain disclosures to protect consumers regarding charges and interest rates  
18 prior to entering into certain transactions. *McDonald v. Checks-N-Advance, Inc. (In re Ferrell)*,  
19 358 B.R. 777, 783, 789 (B.A.P. 9th Cir. 2006).

a) Plaintiffs Have No TILA Claim Against Fannie Mae

Only a “creditor” may be held liable for a TILA violation. *See Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 460-61 (5th Cir. 1999); 15 U.S.C. § 1640(a). Despite Plaintiffs’ contentions in Paragraph 128 of the Amended Complaint, Fannie Mae is not a “creditor” within the terms of TILA.<sup>9</sup> Fannie Mae: (1) does not regularly extend credit directly to consumers, but

<sup>9</sup> 15 U.S.C. § 1602(f) defines “creditor” as “only . . . a person who both (1) regularly extends, whether in connection with loans, sales or property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.”

1 rather solely purchases loan in the secondary market, *see e.g.*, Amd. Compl., at ¶ 25; and (2) is  
2 not the person to whom Plaintiffs' "credit transaction is initially payable on the face of the  
3 evidence of indebtedness," as evidenced by Plaintiffs' mortgage. The evidence of indebtedness  
4 – Plaintiffs' promissory note -- was initially payable to Amerisave Mortgage Corporation. *See*  
5 Amd. Compl., at Ex. A, p. 1-2; *see also* *MRW, Inc. v. Big-O Tires, LLC*, No. 08-1732, 2008 U.S.  
6 Dist. LEXIS 10192, at \*11 (E.D. Cal. Nov. 25, 2008) (observing that on consideration of a  
7 motion to dismiss, the court need not "accept as true unreasonable inferences or conclusory legal  
8 allegations cast in the form of factual allegations.") Moreover, Fannie Mae is barred from  
9 originating loans. 12 U.S.C. § 1719(a)(2). Fannie Mae was therefore not the "creditor" making  
10 Plaintiffs' loan and is not subject to liability under TILA. Plaintiffs' TILA claim with respect to  
11 Fannie Mae must be dismissed as a matter of law.

b) Plaintiffs' TILA Claim Is Time Barred

13 Plaintiffs' TILA claim is governed by a one-year statute of limitations period because it  
14 seeks only compensation for monetary loss. *See Amd. Compl.*, at ¶¶ 128 & 135; 15 U.S.C.  
15 § 1640(e). That limitations period runs from the date of the consummation of the loan at which  
16 time TILA requires lenders to make full disclosures. A loan is "consummated" for TILA  
17 purposes when "a consumer becomes contractually obligated on a credit transaction." 12 C.F.R.  
18 § 226.2(a)(13). Plaintiffs became contractually obligated in this case when they signed their  
19 mortgage and promissory note on September 9, 2005. *See Amd. Compl.*, at ¶ 27, Ex. A, p. 1-2.  
20 Plaintiffs' limitations period for a TILA claim expired in September 2006 and Plaintiffs did not  
21 file this suit until March 19, 2012, well after the limitations period expired. Plaintiffs' TILA  
22 claim against Fannie Mae is time barred.<sup>10</sup>

24 <sup>10</sup> Plaintiffs attempt to circumvent this time bar by arguing that every instance of placement of  
25 LPI created a new loan obligation requiring new TILA disclosures or that equitable tolling  
26 should apply. Amd. Compl., at ¶¶ 66-72 &132. These allegations fail because Plaintiffs'  
27 security instruments expressly authorized both the LPI charges and Wells Fargo's adding them to  
28 the loan principal there was no change in loan terms, no new financing, and no new disclosure  
requirements after the loan was originally funded. Plaintiffs' allegations do not properly invoke  
delayed discovery or equitable tolling, alleging only conclusions, not facts. *See Cervantes v.*  
*Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1045-46 (9th Cir. 2011).

c) No TILA Violation Occurred

2 Plaintiffs' TILA claim alleges a violation of 12 C.F.R. § 226.17(c) by failing to fully  
3 disclose flood insurance requirements in the mortgage, failing to disclose the amount and nature  
4 of the "commission" Wells Fargo's affiliates would receive for the LPI purchase, and failing to  
5 provide disclosures when a "new debt" was created. Amd. Compl., at ¶¶ 131-132. Plaintiffs are  
6 wrong for the reasons discussed above. The mortgage expressly allowed the lender to set the  
7 amount of insurance coverage required, and neither the mortgage nor federal law limits the LPI  
8 to the amount needed to secure the loan balance. Further, the mortgage expressly allowed the  
9 lender to charge the borrower fees related to the LPI and to protect the lender's interest in the  
10 property. *See* Amd. Compl., Ex. A, ¶¶ 5, 9, & 14. The mortgage disclosed that insurance  
11 requirements can change during the term of the loan and allowed LPI premiums to be added to  
12 loan principal. *Id.* at ¶ 5. On this basis there was no failure to disclosure and no TILA violation  
13 and the claim must be dismissed.

(5) *Plaintiffs Have Not Stated A Valid Claim For Violation Of Cal. Bus. & Prof. Code 17200 et seq. Against Fannie Mae*

16 The purpose of California's Unfair Competition Law ("UCL") is "to protect both  
17 consumers and competitors by promoting fair competition in commercial markets for goods and  
18 services." *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 949 (Cal. 2002). Plaintiffs' UCL claim also fails  
19 for at least two reasons and must be dismissed. First, to be "unlawful" under the UCL, the  
20 defendant "must violate another 'borrowed' law. Section 17200 borrows violations of other laws  
21 and treats them as unlawful practices that the unfair competition law makes independently  
22 actionable. Virtually any state, federal or local law can serve as the predicate for an action under  
23 section 17200." *Davis v. HSBC Bank*, No. 10-56488, 2012 U.S. App. LEXIS 18503, at \*34 (9th  
24 Cir. Cal. Aug. 31, 2012) (internal quotations and citations omitted). An unfair business practice  
25 under the UCL is "one that either offends an established public policy or is immoral, unethical,  
26 oppressive, unscrupulous, or substantially injurious to consumers." *McDonald v. Coldwell*  
27 *Banker*, 543 F.3d 498, 506 (9th Cir. 2008). However, as discussed above in detail, Fannie Mae  
28 has not engaged in any "unlawful" or "unfair" conduct that falls within the ambit of Section

1 17200. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010);  
 2 *Flores v. Wells Fargo Bank, N.A.*, No. C11-6619, 2012 WL 2427227, at \*8 (N.D. Cal. June 26,  
 3 2012). All of Plaintiffs' claims against Fannie Mae for breach of contract and the implied  
 4 covenant of good faith and fair dealing, breach of fiduciary duty, and violations of RESPA and  
 5 TILA fail as a matter of law. Further, Wells Fargo is not Fannie Mae's agent and under the  
 6 *Merrill* doctrine, Fannie Mae is not liable for the unauthorized conduct of Wells Fargo if an  
 7 agency relationship exists. Thus, there is no predicate "unlawful" or "unfair" act by Fannie Mae  
 8 upon which a UCL claim can be based.

9         Second, the UCL claim must be dismissed because the injury alleged did not occur in  
 10 California. Plaintiffs did not allege that Fannie Mae engaged in conduct in California that  
 11 affected the Cannons in Florida, the state where the property subject to the LPI is located. The  
 12 UCL is presumed *not* to have extraterritorial application; that presumption is not rebutted here.  
 13 *See Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222 (1999). The alleged  
 14 California Subclass to which the UCL claim applies encompasses "[a]ll individuals in the state of  
 15 California with a loan owned by Fannie Mae or serviced by Wells Fargo . . ." Amd. Compl., at  
 16 ¶ 74. The Cannons, as Florida residents who do not allege any injury from conduct of Fannie  
 17 Mae occurring in California, are not members of this subclass, lack standing, and are improper  
 18 representatives to maintain a class action claim for violation of Cal. Bus. & Prof. Code §§ 17200  
 19 *et seq.* *First Am. Title Ins. Co. v. Superior Court*, 145 Cal. App. 4th 1564, 1573 (2007) ("The  
 20 named plaintiff in a class action must be a member of the class he purports to represent."); *see*  
 21 *also Shapell Industries Inc. v. Superior Court*, 132 Cal. App. 4th 1101, 1111 (2005) ("an  
 22 individual or entity may bring an unfair business practices class action only if he is a member of  
 23 the class injured by the practice.").

24                     **(6) Plaintiffs Cannot Maintain A Claim For Equitable Relief**

25         Plaintiffs seek both an injunction and restitution in a separate count for "equitable relief."  
 26 Amd. Compl., at ¶¶ 157-159. As an initial matter, equitable relief—an injunction or  
 27 restitution—is a remedy, not a claim. There is no independent cause of action for "equitable  
 28 relief;" this claim should be dismissed without leave to amend. *Neu v. Terminix Int'l, Inc.*, No.

1 C07-6472, 2008 U.S. Dist. LEXIS 32844, at \*9-10 (N.D. Cal. Apr. 8, 2008). Further, a claim for  
 2 injunction is fundamentally not a “claim showing that the pleader is entitled to relief.” Fed. R.  
 3 Civ. P. 8(a)(2); *see e.g.*, *Pierson v. Orlando Regional Healthcare Sys., Inc.*, 619 F. Supp. 2d  
 4 1260, 1288 (M.D. Fla. 2009) (“an injunction is not a cause of action but a remedy”) (citations  
 5 omitted). Moreover, Plaintiffs have not shown, and cannot show as a matter of law, that they are  
 6 entitled to either form of relief as against Fannie Mae. There is no basis to enjoin the LPI  
 7 practice, as it is expressly allowed in the security instruments and there is no basis to repay any  
 8 fees that Wells Fargo received in conjunction with placement of LPI because fees for LPI are  
 9 also expressly allowed. Amd. Compl., Ex. A, ¶¶ 5, 9, & 14.

10 **E. The Jury Demand Should Be Stricken Pursuant to Fed. R. Civ. P. 12(f)**

11 Pursuant to Section 25 of Plaintiffs’ Mortgage, Plaintiffs waived their right to a trial by  
 12 jury in any action arising out of the mortgage. Their waiver was made knowingly and  
 13 voluntarily and is conspicuous; therefore, their demand for a jury trial should be stricken  
 14 pursuant to Federal Rule of Civil Procedure 12(f) and Florida law. *Allyn v. W. United Life Assur.*  
 15 *Co.*, 347 F. Supp. 2d 1246, 1251-52, 1256 (M.D. Fla. 2004).

16 **IV. CONCLUSION**

17 For the reasons stated above, Plaintiffs’ Amended Complaint and each cause of action  
 18 contained within should be dismissed for failure to state a claim against Fannie Mae on which  
 19 relief may be granted and judgment should be entered in favor Fannie Mae. Should any claims  
 20 survive or leave to amend be granted, Plaintiffs’ jury demand should be stricken.

21 Dated: September 14, 2012

22 **FOLEY & LARDNER LLP**  
 23 **NANCY L. STAGG**

24  
 25 By: /s/ Nancy L. Stagg  
 26 Attorney for Defendant FANNIE MAE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on September 14, 2012 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Fed. R. Civ. P. 5(b)(3). Counsel of record listed below will be served by electronic mail, facsimile, United States mail, and/or overnight delivery.

Dated: September 14, 2012

Foley & Lardner LLP  
NANCY L. STAGG

By: /s/ *Nancy L. Stagg*  
Attorneys for Defendant FANNIE MAE